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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1985

PATRICK NEWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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No.

PATRICK NEWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Patrick Newell, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered May 2, 1974, affirming the judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW.

The judgment of the United States District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit is reproduced in the Appendix to this Petition.

JURISDICTION.

Petitioner seeks review of the judgment of the United States Court of Appeals for the Seventh Circuit dated May 2, 1974, affirming the conviction of the defendant following a plea of guilty in the United States District Court for the Northern District of Illinois. Rehearing was denied. Jurisdiction of this court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the holding of the United States Court of Appeals for the Seventh Circuit, that the Petitioner's guilty plea was not a violation of Rule 11, is in conflict with decisions of other Courts of Appeals?

2. Whether there was a violation of due process of law and effective assistance of counsel when Petitioner was resentenced by mail?

CONSTITUTIONAL PROVISIONS.

FIFTH AMENDMENT.

"No person shall be . . . subject for the same offense to be twice put in jeopardy of life and limb; . . . nor be deprived of life, liberty, or property without due process of law;"

STATEMENT.

The Petitioner entered a plea of guilty to a criminal indictment and was sentenced to serve three (3) years' probation. That probation was later terminated and Petitioner was sentenced to five (5) years under the provisions of the Federal Youth Corrections Act.

After sentencing Petitioner moved to vacate and set aside the five (5) year sentence asserting that he had not been advised before sentencing of the Court's alternative to sentence him under the Federal Youth Corrections Act. That motion was denied by the trial court and on appeal to the U. S. Court of Appeals for the Seventh Circuit, the Court held that there was no violation of Rule 11 by the denial of Petitioner's motion to set aside and vacate his sentence. However, the U. S. Court of Appeals for the Seventh Circuit vacated Petitioner's sentence and ordered that it be reimposed by the trial court.

A four (4) count criminal indictment was returned by a grand jury sitting in the Northern District of Illinois naming the Petitioner, Newell, and other defendants whose cases are not before this court. Petitioner was named in all four counts (Rec. 1)[1] Counts One (1) and Three (3) of the indictment allege sales and delivery of depressant and stimulant drugs in violation of 21 U. S. C. § 331(q)(2). Counts Two (2) and Four (4) allege possession for sale of depressants or stimulant drugs in violation of 21 U. S. C. § 331(q)(3)(A).

On October 26, 1971, Petitioner, who was then only twenty (20) years of age, with counsel entered a plea of guilty to Count Two (2) of the indictment (Rec. 11, pp. 7-12) and was advised that the maximum penalty for violation of 21 U. S. C. § 331 (q)(3)(A) was five (5) years imprisonment and/or a fine of

1. The words, "Rec. ....." as used herein refers to the Original Record On Appeal filed with the U. S. Court of Appeals and this Court. The number appearing thereafter is the item and page where the fact appears.

not more than Ten Thousand ($10,000.00) Dollars, or both, 21 U. S. C. § 333(b)(1). After sentencing the Government dismissed the remaining three (3) counts as to Petitioner (Rec. 11 p. 13).

On December 7, 1971, the trial court suspended Petitioner's sentence and placed him on probation for a period of three (3) years, the first six (6) months to be served at the Federal Community Center in Chicago and imposed other conditions not relevant here (Rec. 12 pp. 21-28).

Neither at the time the trial court accepted Petitioner's guilty plea nor when he was later sentenced was Petitioner ever advised that he was eligible for sentencing under the Federal Youth Corrections Act, 18 U. S. C. § 5010, et seq. The fact that Petitioner was not so advised was admitted in the trial court by the Government (Supp. Rec.)[2], and acknowledged by the U. S. Court of Appeals for the Seventh Circuit.

On January 19, 1973, the trial court revoked Petitioner's probation, sentenced him to serve five (5) years' imprisonment pursuant to the provisions of the Federal Youth Corrections Act (Rec. 14 pp. 18-20), but did not specify which of five possible subsections of the Youth Corrections Act to which the Court intended to sentence Petitioner. Petitioner was immediately incarcerated and served that sentence from January 19, 1973, until June 12, 1973, when he posted an appeal bond (Supp. Rec.).

On April 20, 1973, Petitioner, with new counsel, moved to set aside and vacate the five (5) year sentence (Rec. 6). On May 30, 1973, the trial court denied that motion by a written order sent through the mail to Petitioner's counsel (Rec. 16). In that order the trial court indicated that it had designated subsection (b) of the Federal Youth Corrections Act as the

2. The term "(Supp. Rec.)" as used herein refers to the Supplemental Record on Apppeal filed with the U. S. Court of Appeals on August 15, 1973, and transmitted to this Court.

subsection under which it had sentenced Petitioner. Neither Petitioner nor his counsel were present for this proceeding. Thereafter, Petitioner filed a Notice of Appeal from that resentencing order (Rec. 20). Because the Federal Youth Corrections Act, 18 U. S. C. § 5010, is crucial to Newell's appeal, it is set out in a footnote below.[3]

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3. "§ 5010. Sentence.

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

"(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings. Added Sept. 30, 1950, c. 1115, § 2, 64, Stat. 1087."

REASONS FOR GRANTING THE WRIT.

A. The Holding of the Court of Appeals for the Seventh Circuit That Petitioner's Guilty Plea Was Not a Violation of Rule 11, Fed. R. Crim. Pro., Is in Conflict with the Decision of Other Courts of Appeals.

Rule 11 Fed. R. Crim. Pro., requires that the court shall not accept a guilty plea unless it has determined:

> ". . . that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.*" [emphasis added]

It is only after a defendant has been made fully aware of the charge and the consequences of his plea that he may be said to have intelligently and voluntarily weighed that information so that a guilty plea can be accepted. When there is a failure to adequately and completely inform, then the defendant may either be misled or given insufficient advice concerning the possible sentencing alternatives available to the court. In just such a situation, here the Petitioner, being only twenty years old, did not fully appreciate the consequences of his plea.

The trial court (Rec. 16), the Government (Supp. Rec.), and the Court of Appeals for the Seventh Circuit all concede that prior to the acceptance of his plea, Petitioner was not advised that his sentence could be imposed under the Federal Youth Corrections Act as an alternative to the punishment provided by 21 U. S. C. § 331(b)(1). The trial court, in denying Petitioner's motion to set aside his sentence, said that, *"Newell was not advised of the possible six-year commitment, and he was never given a six-year sentence."* (Rec. 16 p. 2). This statement is contrary to the provisions of 18 U. S. C. § 5010(b) which specifically provides for a sentence of up to six (6) years.

However, the purpose of Rule 11 is not to prevent sentencing beyond the statutory maximum but to require the sentencing court to determine whether a defendant fully understands the consequences of a guilty plea before acceptance.

The Court of Appeals for the Seventh Circuit held that this failure was not a violation of Rule 11, holding instead that Petitioner's sentence did not exceed the maximum under the statute, relying on *Workman* v. *United States*, 337 F. 2d 226 (1st Cir. 1964) and *McKay* v. *United States*, 274 F. Supp. 1022 (N. D. D. 1967). However, if Petitioner has only a five (5) year sentence, why did the Court of Appeals for the Seventh Circuit see fit to vacate that sentence and order it reimposed under 18 U. S. C. § 5010(d)? If Petitioner's sentence is valid and not more than five years, reimposition is unnecessary.

Out of just consideration for persons accused of crime, courts should not accept guilty pleas unless they are voluntarily made after proper advice with full understanding of the consequences. *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927).

Most of the United States Courts of Appeals have held that where the advice or information given the defendant pursuant to the defendant's guilty plea has been insufficient to adequately inform him of the sentencing alternatives to which he might be subjected, a sentence under the alternatives to which a sentence under the alternative not brought to the attention of the defendant, although judicially correct in all other respects, must be vacated and set aside pursuant to Rule 11, *Pilkington* v. *United States*, 315 F. 2d 204 (4th Cir. 1963)[4]. In *Pilkington*,

4. Accord: *Stephens* v. *United States*, 383 F. 2d 428 (5th Cir. 1967); *Freeman* v. *United States*, 350 F. 2d 940 (9th Cir. 1965); *King* v. *United States*, 346 F. 2d 159 (10th Cir. 1965); *Chapin* v. *United States*, 341 F. 2d 900 (10th Cir. 1965); *Workman* v. *United States*, 337 F. 2d 226 (1st Cir. 1964); *Flores* v. *United States*, 337 F. Supp. 45 (D. C. Puerto Rico 1971); *Quibell* v. *United States*, 265 F. Supp. 474 (S. D. Calif. 1966); *Knott* v. *United States*, 254 F. Supp. 984 (D. Alaska 1966); *McCullough* v. *United States*, 231 F. Supp. 740 (N. D. Fla. 1964); and *Rowe* v. *United States*, 227 F. Supp. 666 (W. D. Wis. 1964).

supra, the court, in an almost identical situation, said at page 208:

> "The point made is that the defendant was permitted to plead guilty under a misapprehension as to the penalties to which the plea subjected him. Rule 11, Fed. R. Crim. Pro., requires the judge to leave no room for such misapprehension. However looked at, the deprivation of liberty for a possible period of six years is a greater penalty than a sentence for a lesser period."

Here the trial court, the Government, the Court of Appeals, and the defendant all agree that Petitioner was not previously advised that the Court had the alternative of sentencing him under the Federal Youth Corrections Act. Certainly this was an appropriate case to set aside the defendant's sentence and permit him to re-plead anew, not to permit reimposition of sentence.

In *Freeman* v. *United States*, 350 F. 2d 940 (9th Cir. 1965), the Ninth Circuit Court of Appeals held that the failure to advise a youthful defendant that a sentence under the Youth Corrections Act was one year longer than under the Dyer Act was a violation of Rule 11, saying at page 942:

> ". . . we specifically now hold that *a defendant* who pleads guilty to an offense where the maximum penalty is less than six years and is eligible for sentencing under the Federal Youth Corrections Act, *should be advised that he could be sentenced under the Federal Youth Corrections Act and that he could be 'released conditionally under supervision on or before the expiration of four years from the date of his conviction and * * * discharged unconditionally on or before six years from the date of his conviction' 18 U. S. C. A. § 5017 (c). (1950).*" [emphasis added].

The Court of Appeals for the Seventh Circuit held that the *Freeman* and *Pilkington* cases, *supra*, were not "helpful" to Petitioner since in both of those cases they were told they could only receive five year maximum sentences and were subsequently resentenced under § 5010(b) with the possibility of a six-year

sentence. Petitioner contends that is exactly what happened to him and the Seventh Circuit recognized that fact otherwise there would have been no need to reimpose Petitioner's sentence. Therefore, the holding of the Court of Appeals for the Seventh Circuit is squarely in conflict with Fourth and Ninth Circuit Courts of Appeals in the *Freeman* and *Pilkington* cases.[5] Rule 11 requires the court in disposing of criminal cases against youthful defendants to carefully explain the maximum and minimum sentences possible under the substantive statute as well as under the Federal Youth Corrections Act before accepting a guilty plea. That is clearly recognized in *Freeman* and *Pilkington*. This is especially important in light of the many options that the sentencing court has under the Federal Youth Corrections Act.

It is important for trial courts in disposing of a criminal case against a youthful offender to very carefully explain the provisions of the Federal Youth Corrections Act before accepting a plea of guilty especially where, as here, the Youth Corrections Act carries a maximum penalty larger than the statute violated. That is the thrust of the holdings in the *Freeman* and *Pilkington* cases. Here the trial court conceded that it did not advise Petitioner that he could also be sentenced under the Federal Youth Corrections Act. Petitioner, therefore, was only advised of one half of the potential sentencing alternatives open to the court and could not possibly have entered his plea with full knowledge of the consequences.

In *Pilkington* v. *United States*, 315 F. 2d 204 (4th Cir. 1963), it was held the failure to advise the defendant of the range of allowable punishments under the Youth Corrections Act might be a deprivation of due process of law or warrant withdrawal of a guilty plea under Rule 32(d) Fed. R. Crim.

5. The decision of the U. S. Court of Appeals for the Seventh Circuit in petitioner's case also appears to be in conflict with the objective of the Act which was, ". . . designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket to rehabilitate them and restore normal behavior patterns.", *Dorszinski* v. *United States*, ... U. S. ..... (1974), 15 Cr L 3269, 3270 (No. 73-5284 decided 6/26/74).

Pro. In *Pilkington, supra,* as here, the youthful defendant was advised by the trial judge that the maximum penalty for the offense charged was five years' imprisonment. The defendant then pleaded guilty and was sentenced under the Federal Youth Corrections Act to a term of from sixty days to six years. The court in *Pilkington* in setting aside the plea emphasized that Rule 11 requires that no room be left for misapprehension by a defendant. Nothing less will suffice under Rule 11 than complete understanding of the possible sentence, including the penalties under the Federal Youth Corrections Act.

Petitioner requests that this Court grant his Petition to determine whether the holding of the U. S. Court of Appeals for the Seventh Circuit that his plea was not taken in violation of Rule 11 is in conflict with other circuits and specifically the Ninth and Fourth Circuits in *Freeman* and *Pilkington.*

Further, the Court of Appeals should not be able to fashion a new remedy but should have followed this Court's ruling in *McCarthy* v. *United States,* 394 U. S. 459, 471-472 (1969).

In *McCarthy,* this court held that noncompliance with Rule 11 in accepting a guilty plea vitiates the plea and necessitates the opportunity to plead anew. In *Flores* v. *United States,* 337 F. Supp. 45, 49-50 (D. C. P. R. 1971), a case decided after *McCarthy* case, held that the proper remedy is to permit the defendant the opportunity to plead anew.[6]

If this court finds, as conceded by the Government in the trial court, that there was a violation of Rule 11, then the situation does not call for a resentencing. Petitioner must be permitted to plead anew. In the *McCarthy* case, *supra,* the court said at page 468:

> "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designated to facilitate a more accurate determination of

6. A review of the reasons for permitting a defendant to plead anew is contained in *Quibell* v. *United States,* 265 F. Supp. 474, 478-480 (S. D. Calif. 1966).

the voluntariness of his plea. *Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.* It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." [emphasis supplied]

B. The Resentencing of the Petitioner by Mail Denied Him Effective Assistance of Counsel and Due Process of Law.

Petitioner's probation was revoked by the trial court on January 19, 1973, when it also sentenced him to serve five (5) years in the custody of the Attorney General under the provisions of the Youth Corrections Act (Rec. 5). A Judgment and Commitment Order was then executed specifying that the sentence was pursuant to the Youth Corrections Act (Rec. 5). However, that order contained no reference to the subsection to which the court intended to sentence Petitioner. Since Title 18 U. S. C. § 5010 has five subsections, Petitioner asserts it is unclear which of these subsections the trial court intended to sentence him. However, it is clear that the court intended a specific five-year sentence and not an indeterminate sentence (Rec. 14 p. 18). The trial court may have originally intended to sentence Petitioner under subsection (d), but it is crystal clear that it did not intend subsection (b) which is an indeterminate sentence and the trial judge intended a determinate five (5) year sentence.

The court in ruling on Petitioner's motion to withdraw his plea stated that it sentenced Petitioner to the custody of the Attorney General for a period of five (5) years pursuant to 18 U. S. C. § 5010(b). Petitioner asserts that the entry of this order without his knowledge or consent was illegal and not

simply a correction of a clerical error which is permitted by Rule 36, but a new sentence of from four (4) to six (6) years, potentially one (1) year longer than the five (5) year sentence.

Therefore, under the circumstances, a sentencing to subsection (b) was a change of Newell's sentence from five (5) years to one of from four (4) to six (6) years. By the execution of a new commitment order the trial court did exactly what it said it did not intend to do—sentence the defendants to a six-year term.

The trial court's order of May 30, 1973, was received by Petitioner's counsel by mail, neither he nor Petitioner appeared at this resentencing. This was a violation of defendant's right to the effective assistance of counsel and due process of law, Rule 32(a)(1) provides that:

> "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation."

It was never explained to Petitioner that under the Federal Youth Corrections Act his sentence would be for an indeterminate period during which he might be released conditionally not more than four (4) years after his conviction and unconditionally not more than six (6) years after his conviction.

While Rule 36 permits rectifying clerical errors in a judgment and commitment without notice, *United States* v. *Feldman*, 226 F. Supp. 750, 752 (D. C. Nev. 1964), vacated on other grounds. *Gilinsky* v. *United States*, 335 F. 2d 914 (9th Cir. 1964), it is limited to clerical errors. *United States* v. *Marchese*, 341 F. 2d 782 (9th Cir. 1965) cert. denied 382 U. S. 817.[7]

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7. Accord: *United States* v. *Dandridge*, 437 F. 2d 1324, 1329 (7th Cir. 1971).

In this instance Petitioner was incarcerated from January 19, 1973, when his probation was revoked until June 12, 1973, when he was released on bond pending appeal. Thanks to the double jeopardy provision of the Fifth Amendment, a federal court may not increase a sentence of imprisonment once execution has begun, *United States* v. *Rosenstreich,* 204 F. 2d 321 (2d Cir. 1953). That is exactly what the trial court did when it changed Petitioner's sentence from five (5) years to one of four (4) to six (6) years.

In *Kennedy* v. *Reid,* 249 F. 2d 492, 496-497 (D. C. Cir. 1957), the court in analyzing a similar situation said that:

> "While the Rule indicates that the court may act after such notice as it deems appropriate, we believe that except as to purely perfunctory aspects, the better practice should command the presence of the prisoner in circumstances such as are shown here. We have said as much before. There may well be situations where factually there are lacking items of evidence essential to the ascertainment of the foundation for the imprisonment. Surely in so important a matter as restraint of a man's liberty he should be permitted to attend, to be heard and to show cause, if proper cause there by, why further imprisonment is not to follow. Thus, the correcting orders . . . should not have been entered in the absence of the petitioner."

The trial court in *United States* v. *Walker,* 346 F. 2d 428 (4th Cir. 1965), imposed a three (3) year sentence after reviewing a report from the bureau of prisons. On appeal, it was held in *Walker, supra,* that this sentencing violated due process since it was imposed in the absence of the defendant. The court in *Walker* concluded that when the defendant sought correction of this sentence, the trial court could not enlarge the sentence beyond three (3) years and invaded his Fifth Amendment rights, stating at page 430 that:

> " . . . the importance of the court's ruling was to condition his Constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. Thus, though not so intending, the court potentially

> penalized him for asserting the privilege. This the law forbids, procedural logic notwithstanding. *Green* v. *United States,* 355 U. S. 184, 191 et seq., 78 S. Ct. 221; L. Ed. 2d 199 (1957)."

Petitioner's second sentence imposed by the Court on May 30, 1973, is a new and different four (4) to six (6) year sentence. It is not the five (5) year sentence originally imposed. Before a second sentence can be imposed, the first sentence must have been vacated. Since the execution of Petitioner's sentence had begun, because neither he nor his counsel were present or notified, due process and Rule 32(a)(1) were violated.

Recently, the court in *United States* v. *Teresi,* ..... F. 2d ..... (7th Cir. 1973), No. 73-1354, said:

> "It is a well-settled general rule that increasing a sentence after a defendant commenced to serve it a violation of the constitutional guarantee against double jeopardy, *United States* v. *Sacco,* 367 F. 2d 368, 369 (2d Cir. 1966), and cases cited therein."

The Government conceded that an error was made when the trial court designated 18 U. S. C. § 5010(b), apparently agreeing that this was a resentencing. Nevertheless the Court of Appeals vacated Petitioner's sentence and remanded the cause for "correction" of Petitioner's sentence. However, it is Petitioner's contention that the imposition of the original five-year sentence was in violation of Rule 11. That violation vitiates his plea and he should be permitted to plea anew, *McCarthy* v. *United States,* 394 U. S. 459, 471-472 (1969). What occurred thereafter, while also illegal, does not alter the failure to warn of sentencing alternatives even if the second sentence is unlawful because it was imposed after Petitioner had begun serving his sentence. *United States* v. *Teresi,* ..... F. 2d ..... (7th Cir. 1973), No. 73-1354.

CONCLUSION.

For the foregoing reasons, Petitioner requests that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 3, 1974.

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued January 17, 1974
May 2, 1974

Before

HON. ROGER J. KILEY, *Senior Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JESSE E. ESCHBACH, *District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 73-1663 *vs.*
PATRICK NEWELL,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71-CR-153
Thomas R. McMillen, Judge.

ORDER

Defendant Newell was convicted on his guilty plea for possession of narcotics for sale in violation of 21 U. S. C. § 331(q)(3(A). Although sentenced to the maximum of five years, the sentence was suspended and he was placed on probation for three years with the first six months to be spent at the Federal Community Treatment Center.

* District Judge Jesse E. Eschbach of the Northern District of Indiana is sitting by designation.

Shortly over one year later he was arrested for a state narcotics law violation, and following a hearing the district court revoked his probation and resentenced him to serve five years under the Youth Corrections Act (YCA), 18 U. S. C. § 5005, *et seq.*, without specifying under which subsection of § 5010 of the YCA sentence was imposed. Thereafter the judge "corrected" the sentence so that it ran "pursuant to 18 U. S. C. 5010(b)" but limited it again to a five year maximum. This appeal followed.

Before accepting his plea, the district judge informed Newell only that the maximum sentence under the narcotics statute was five years and/or a $10,000 fine and failed to advise Newell that he was eligible for sentencing under the YCA with a potential six year maximum sentence. Newell contends that the failure of the district judge to advise him of the possible six year sentence violated Rule 11 of the Federal Rules of Criminal Procedure and vitiated his guilty plea. We disagree.

While it would be better practice to fully inform the defendant of all sentencing possibilities, where the actual sentence imposed under the YCA does not exceed the maximum sentence under the statute to which the defendant pleaded guilty, there is no violation of Rule 11. *Workman* v. *United States*, 337 F. 2d 226 (1st Cir. 1964); *McKay* v. *United States*, 274 F. Supp. 1022 (D. N. D. 1967). His plea was therefore valid.

Freeman v. *United States*, 350 F. 2d 940 (9th Cir. 1965), and *Pilkington* v. *United States*, 315 F. 2d 204 (4th Cir. 1963), relied on by Newell, are not helpful to him. In both cases the defendants were told they could receive five year maximum sentences, pleaded guilty, and were subsequently resentenced under § 5010(b) with the possibility of a six year sentence.

The sentence imposed under the YCA herein was five years, and was the maximum sentence Newell could have been given on revocation of probation had he been resentenced under the narcotics statute.

We are not persuaded by Newell's second contention that the district judge's subsequent "correction," designating § 5010(b), was actually a resentencing. The court, upon revoking Newell's probation, modified the originally suspended sentence by sentencing Newell to the custody of the Attorney General under the YCA. The court mistakenly did so by designating merely § 5010. The court subsequently specified § 5010(b), but repeated the five year limitation. The judge clearly intended not to have Newell detained for longer than the five year maximum sentence for the offense to which Newell pleaded guilty.

The government concedes, however, that the judge's designation of § 5010(b) is inconsistent with his intention to fix a five year maximum since the court can fix a determinate sentence only under § 5010(b), and that the sentence is therefore erroneous.

The government requests us to remand for correction of the sentence. Newell requests us to reverse the court's denial of his motion to set aside the sentence and remand for an opportunity to plead again.

We deny Newell's request since we have already decided the plea is valid, but we think the interests of justice require that we vacate the sentence and remand the cause to the district court with directions to re-impose the sentence in accordance with 18 U. S. C. § 5010(d), and it is so ORDERED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1985

PATRICK NEWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the district court violated Rule 11, Fed. R. Crim P., by failing to advise him of his eligibility to be sentenced pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, before accepting his guilty plea, and that the judge erroneously failed to order petitioner's presence when he corrected the sentence.

In 1971 an indictment was filed in the United States District Court of the Northern District of Illinois charging petitioner in four counts with sale and possession of depressant or stimulant drugs in violation of 21 U.S.C. (Supp. IV, 1964 ed.) 331(q)(3)(A). At his arraignment on October 26, 1971, peitioner withdrew his not guilty plea to one of the possession counts (Count Two), and entered a plea of guilty. Before accepting the plea, however, the district judge conducted an inquiry into

its voluntariness, as required by Rule 11, Fed. R. Crim. P. The court explained, *inter alia*, that the count could draw a maximum sentence of five years' imprisonment and a $10,000 fine. Following this colloquy, the court accepted the plea and the remaining counts were dismissed on motion of the government. On December 7, 1971, petitioner was sentenced to five years' imprisonment. Execution of sentence was suspended and he was placed on probation for three years, the first six months to be served in a federal community treatment center.

On January 19, 1973, the government moved to revoke petitioner's probation because petitioner had concededly violated certain state narcotic laws. The court thereupon revoked probation and resentenced petitioner, then age twenty-one, to a term of five years' imprisonment. In its sentencing order the court noted that it was exercising the sentencing provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010. However, the formal order failed to indicate which of the five subparagraphs of Section 5010 were being employed.[1] Thereafter, petitioner pointed to this omission in a motion to vacate his sentence. In denying the motion on May 30, 1973, the trial judge stated that he had intended subsection (b) of the Federal Youth Corrections Act[2] to govern, although the sentence remained

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[1]The statute has been set forth in its entirety at Pet. 5.

[2]18 U.S.C. 5010(b) provides:

> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter * * *.

fixed at five years' imprisonment. The court of appeals vacated the sentence and remanded the case to the district court with instructions that petitioner be sentenced in accordance with 18 U.S.C. 5010(d)[3] (Pet. App. A), since subsection (b) might result in six years' confinement.

1. Petitioner's contention that the court violated Rule 11, Fed. R. Crim. P., by failing to advise him of his eligibility to be sentenced pursuant to the Federal Youth Corrections Act, is unsound, since Rule 11 only requires that the court inform a defendant of the maximum penalty that can be given for his offense. Here, petitioner was warned that he could receive up to five years' imprisonment. That, in fact, is what he received. See *Robinson* v. *United States*, 474 F. 2d 1085, 1088 (C.A. 5), petition for a writ of certiorari pending, No. 73-7043.

There is no conflict among the circuits on this issue. In *Freeman* v. *United States*, 350 F. 2d 940 (C.A. 9), and *Pilkington* v. *United States*, 315 F. 2d 204 (C.A. 4), both relied upon by petitioner, the defendants were told prior to pleading guilty that they could receive maximum five-year sentences, but were subsequently resentenced under Section 5010(b) with the possibility of a six-year term. Here, however, the court of appeals vacated the sentence and remanded the case to the district court with instructions that petitioner be sentenced pursuant to Section 5010(d), rather than subsection (b), so that the possibility of a six-year sentence could be avoided. Petitioner's fear that he may be subject to a term in excess of five years is therefore purely speculative and unfounded.

[3] 18 U.S.C. 5010 (d) provides:

> If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

2. Petitioner's contention that he was entitled to be present when the district court first issued its order specifying that the term of imprisonment was pursuant to Section 5010(b) of the Youth Corrections Act, ignores the fact that this action was not taken at a "[critical] stage of the proceedings" requiring the attendence of the defendant. Rule 43, Fed. R. Crim. R. In any case, the order of the court below, vacating and remanding petitioner's sentence, vitiates any prejudice which might have occurred due to petitioner's absence. See *United States* v. *Birnbaum*, 421 F. 2d 993, 998 (C.A. 2), certiorari denied, 397 U.S. 1044; *United States* v. *McCray*, 468 F. 2d 446 (C.A. 10).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10